MOTION FILED DEC 1961

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 286

UNITED STATES OF AMERICA, *Appellant*,

v.

DIEBOLD, INCORPORATED, *Appellee*.

On Appeal from the United States District Court for the Southern District of Ohio

APPELLEE'S MOTION TO UNSEAL SEALED PAPERS AND MAKE THEM PART OF THE OPEN RECORD ON APPEAL, AND BRIEF IN SUPPORT THEREOF

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APPELLEE'S MOTION TO UNSEAL SEALED PAPERS AND MAKE THEM PART OF THE OPEN RECORD ON APPEAL

Diebold, Incorporated, appellee in this cause, moves the Court for an order authorizing and directing the Clerk of this Court to unseal and make part of the open record on appeal, available for use in the printed record if so designated by the parties, the affidavit of Albert Neisser, filed in the District Court on March

1, 1961, and all attachments thereto. These papers have been sealed by order of the District Court and are part of the certified record on appeal, though remaining under seal.

The grounds for this motion appear in the attached Brief.

Respectfully submitted,

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December 1961

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BRIEF IN SUPPORT OF APPELLEE'S MOTION TO UNSEAL SEALED PAPERS AND MAKE THEM PART OF THE OPEN RECORD ON APPEAL

STATEMENT

The complaint in this case alleged that the acquisition by Diebold, Incorporated (Diebold) of the assets of Herring-Hall-Marvin Safe Company (HHM) would substantially lessen competition or tend to create a monopoly, in violation of Section 7 of the Clayton Act. After extensive discovery had been had, Diebold moved for Summary Judgment, asserting that HHM was so hopelessly insolvent at the time of its acquisition that the acquisition could not violate Section 7. In opposition to Diebold's motion, the Government took depositions and filed affidavits which, under the Government's theory, were intended to show that HHM was not a "failing company"; rather, that its basic economic condition was sound.

One of the Government's affidavits, that of Albert Neisser, a Government economist, included a detailed comparison of the financial condition and operating performance of HHM and of two other companies, Diebold and Mosler Safe Company (Mosler), based in part on an examination of the income tax returns of those companies. Mosler, which is not a party to this litigation,[1] moved the District Court "to seal and suppress those portions [of the Neisser affidavit] . . . which disclose trade secret information obtained by the plaintiff from the original income tax returns filed by the Mosler Safe Company. . . ." (1st para. of the Order, attached hereto as Appendix A).

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[1] Mosler is being duly served with a copy of this Motion, in view of its interest herein.

The District Court granted Diebold's motion for summary judgment on March 8, 1961. During the hearing on Diebold's Motion, the Court observed that "the Neisser affidavit is a part of the record and we are taking that into consideration in deciding this." (Transcript of Hearing, March 8, 1961, p. 10). At the hearing, however, the Court directed each party to turn over to the Clerk all copies of the affidavit and its attachments. Thereafter, on March 28, 1961, the Court entered the attached order in response to Mosler's motion. The order indicated that the Neisser affidavit and attachments had been duly considered, but ordered them, and all copies of them, sealed. The papers were transmitted under seal to the Clerk of this Court in connection with the Government's appeal herein. This Court has on November 6, 1961, noted probable jurisdiction of the United States' appeal from the judgment in Diebold's favor.

ARGUMENT

1. The sealed Neisser affidavit and attachments include material which is relevant to the issues on appeal. As the record plainly indicates, this material was considered by the District Court in deciding the case below. It is, therefore, clearly necessary that it be part of the open record on appeal before this Court. Before the public interest in the publicity of evidence in antitrust matters, the interest of private parties in so-called "trade secrets" must yield, as numerous decisions establish. See *Service Liquor Distributors* v. *Calvert Distillers Corp.*, 16 F.R.D. 507, 509 (S.D. N.Y., 1954); *United States* v. *Lever Bros. Co.*, 193 F. Supp. 254 (S.D. N.Y., 1961); *H. P. Hood & Sons, Inc.*, Dkt. 7709, F.T.C., March 14, 1961, 1960-61 CCH FTC Cas. ¶29,461; cf. Publicity in Taking Evidence Act, Act of

March 3, 1913, 37 Stat. 731, 15 U.S.C. §30; *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 683 (1958).

The relevance of the papers in question to the issues on appeal is confirmed by the fact that the Government has designated most of them in its Designation for Printing.[2] See Item 21. And the lack of any basis for keeping them *in camera*, as opposed to the public interest in making public these relevant documents in an antitrust proceeding is underscored by the fact that the authorities cited by Mosler to the District Court in support of secrecy—Sections 6103 and 7213 of the Internal Revenue Code, and Treasury Regulations 301.6103—actually allow publication of the documents here. Section 6103(a)(2) allows income tax returns to be open to examination "to such extent as shall be authorized in rules and regulations promulgated by the President," and Regulations 301.6103(h) permit their use in litigation "if the United States is interested in the result."

2. No alternative form of dealing with the sealed material other than making it completely part of the public record will suffice to enable this case to be properly briefed and argued. The case involves a review of the factual basis on which the District Court concluded that HHM was so hopelessly insolvent at the time of its acquisition by Diebold that the acquisition could not violate Section 7. The United States has made reference to the affidavit in its Jurisdictional Statement (page 11), and more detailed references will doubtless have to be made in the briefs and in oral argument, when the District Court's findings and con-

[2] The Government's Designation refers to a Motion to be made to unseal the papers in question.

clusions are reviewed on the merits. Any device that would require references of this sort to be made "*in camera*" would be grossly awkward and inconvenient for the parties and the Court.

CONCLUSION

For the reasons stated, Diebold's Motion to unseal the sealed papers in question, and make them part of the open record in this cause, fully available for printing as part of the printed record if designated, should be granted.

Respectfully submitted,

December 1961

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APPENDIX A

[Caption Omitted]

Order

The Mosler Safe Company having moved this Court by a Notice of Motion dated March 3, 1961, to seal and suppress those portions of an affidavit filed by the Plaintiff in this matter (Neisser affidavit) which disclose trade secret information obtained by the Plaintiff from the original income tax returns filed by the Mosler Safe Company, and said motion having duly come on to be heard before this Court on March 8, 1961.

Now, upon reading and filing the Notice of Motion dated March 3, 1961 and the affidavit of Edgar E. Barton dated March 3, 1961, together with proof of due service thereof, in support of said motion; and having read and considered the said affidavit filed by Plaintiff (Neisser affidavit); and oral argument having been heard thereon; and counsel for defendants having orally stipulated that the portions of the said affidavit relating to Mosler Safe Company will not be disclosed to their clients or to the public pending further order of this Court; it is

ORDERED that said motion to seal the affidavit filed by Plaintiff (Neisser affidavit) is granted pending further order of this Court; and it is further

ORDERED that the said affidavit filed by Plaintiff (Neisser affidavit) be detached from the file and sealed by the Clerk of this Court together with the copies of the said affidavit and supporting schedules turned over to the Clerk by the parties to the action, pending further order of this Court.

Dated: Cincinnati, Ohio

March 28, 1961.

/s/ JOHN H. DRUFFEL
United States District Judge

Certificate of Service

I hereby certify that the above Motion and Supporting Brief was this day served (1) on the United States, appellant herein, by depositing copies thereof in a United States mailbox postage prepaid duly addressed to the Solicitor General, Department of Justice, Washington 25, D. C., and (2) on the Mosler Safe Company, whose interests are affected thereby, by depositing copies thereof in a United States mailbox postage prepaid duly addressed to counsel for the Mosler Safe Company, Edgar E. Barton, Esquire, White & Case, 14 Wall Street, New York 5, New York.

Dated: this day of , 1961

WILLIAM L. MCGOVERN
Of Counsel for Appellee